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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

—v.—

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a party that voluntarily injects itself in a public controversy avoid becoming a limited-purpose public figure under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) by avoiding comment on that controversy?

2. May a corporation, which has thrust itself into the center of a continuing public controversy by soliciting and selling to a county for purchase with public funds a product touted by the corporation as the solution to a long-standing, highly controversial, public problem within the county, avoid becoming a limited-purpose public figure under *Gertz* v. *Robert Welch, Inc.* by simply eschewing comment on the controversy?

LIST OF PARTIES AND RULE 29.6 STATEMENT

American Broadcasting Companies, Inc. ("ABC") was the defendant-appellee below and is the petitioner in this Court. Lundell Manufacturing Company, Inc. ("Lundell") was the plaintiff-appellant below and is the respondent in this Court. (Capital Cities/ABC, Inc. (since renamed ABC, Inc.) was dismissed as a defendant during trial and was not a party in the appeal below.)

Pursuant to Rule 29.1, petitioner informs the Court of the following:

ABC is a wholly owned subsidiary of ABC Holding Company Inc., which is itself a wholly owned subsidiary of ABC, Inc. ABC, Inc. is a wholly owned subsidiary of Disney Enterprises, Inc., which is itself a wholly owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. The Opinions of the District Court	5
B. The Court of Appeals Decision	6
REASONS FOR GRANTING THE WRIT	8
WITHOUT THE GUIDANCE OF THIS COURT, A SPLIT AMONG THE CIRCUITS WILL CONTINUE TO PRODUCE UNPREDICTABLE RESULTS AS TO WHETHER A PARTY THAT HAS PLACED ITSELF AT THE CENTER OF AN ONGOING PUBLIC CONTROVERSY MAY AVOID PUBLIC FIGURE STATUS SIMPLY BY DECLINING TO SPEAK TO THE PRESS	8
A. A Split Among The Circuits Exists As To Whether The *Gertz* Requirement Of "Participation" In A Controversy Requires A Potential Public Figure Itself To Speak Out On The Controversy	10

PAGE

B. The Court Should Adopt A Standard That Recognizes The Public Figure Status Of Both Speakers And Other Participants In Public Controversies..... 15

C. It Is Particularly Important To Provide The Press With The Breathing Space Provided By The Public Figure Standard When, As Here, A Plaintiff By Its Conduct Has Invited Public Attention And Assumed The Risk Of Media Scrutiny 16

CONCLUSION..... 21

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit, October 15, 1996 (reversing judgment for defendant)..... 1a

Order of the United States District Court for the Northern District of Iowa, September 28, 1995 (granting judgment as a matter of law to defendant)..... 27a

Bench Decision of the United States District Court for the Northern District of Iowa, May 13, 1994 (directing verdict for defendant on actual malice) 38a

Order of the United States District Court for the Northern District of Iowa, April 13, 1994 (denying summary judgment to defendant)..... 42a

Order of the United States Court of Appeals for the Eighth Circuit, November 26, 1996 (denying rehearing with suggestion for rehearing *en banc*) . 63a

TABLE OF AUTHORITIES

Cases PAGE

Arctic Co. v. *Loudoun Times Mirror*, 624 F.2d 518 (4th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) 18n

Clardy v. *Cowles Publishing Co.*, 912 P.2d 1078 (Wash. Ct. App. 1996) 14n

Clyburn v. *News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990)..... 14, 18n

Copp v. *Paxton*, 45 Cal. App. 4th 829, 52 Cal. Rptr. 2d 831 (Cal. Ct. App. 1996), *review denied* (Cal. Aug. 14, 1996) 14n

Dairy Stores, Inc. v. *Sentinel Publishing Co.*, 516 A.2d 220 (N.J. 1986)..... 17n

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) ....*passim*

Golden Bear Distributing Systems of Texas, Inc. v. *Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983).. 17n

Harris v. *Quadracci*, 48 F.3d 247 (7th Cir. 1995).... 10, 14n

Hunter v. *Hartman*, 545 N.W.2d 699 (Minn. Ct. App. 1996), *review denied* (Minn. June 19, 1996) 14n

Hutchinson v. *Proxmire*, 443 U.S. 111 (1979) 7, 11, 12

Jadwin v. *Minneapolis Star & Tribune Co.*, 367 N.W.2d 476 (Minn. 1985)..... 20n

Lawrence v. *Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981)..... 11

PAGE

Marcone v. *Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 12-13, 18

Martin Marietta Corp. v. *Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976) 20n

McDowell v. *Paiewonsky*, 769 F.2d 942 (3d Cir. 1985) 12, 18

Mount Juneau Enterprises, Inc. v. *Juneau Empire*, 891 P.2d 829 (Alaska 1995) 14n

National Foundation for Cancer Research, Inc. v. *Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983) 17n

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964). 14, 19

Nicholson v. *Promotors on Listings*, 159 F.R.D. 343 (D. Mass. 1994) 18n

Reuber v. *Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.) (*en banc*), *cert. denied*, 501 U.S. 1212 (1991) 18n

Rosanova v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978) 13

Snead v. *Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994) 10

Steaks Unlimited, Inc. v. *Deaner*, 623 F.2d 264 (3d Cir. 1980) 17n

Trotter v. *Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5th Cir. 1987). 13, 14

PAGE

Waldbaum v. *Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) 13-14

Constitutional Provision

U.S. Const. Amend. I..... *passim*

Statutes

Foreign Relations Law
22 U.S.C. § 2586 (1994) 20

Judicial Code
28 U.S.C. § 1254(1) (1994) 2
28 U.S.C. § 1291 (1994) 2
28 U.S.C. § 1332 (1994) 2, 5

Regulation

41 C.F.R. § 60-1.40(c) (1996)..... 20

Newspapers

Peter Behr, *Solving the Privatization Puzzle*, The Washington Post, Feb. 13, 1995, at F-01 19

Bill Kovach, *When Public Business Goes Private*, The New York Times, Dec. 4, 1996, at A-29 19

Tony Perry, *Waging a Low-Key War on Napalm*, Los Angeles Times, Dec. 3, 1994, at A-1..... 16

David Wessel, *The American Way? In the U.S., Ideology and Budget Concerns Are Feeding the Privatization Fever. But Are We Going Too Far?*, The Wall Street Journal, Oct. 2, 1995 ..... 19n

PAGE

Richard Wolf, *Local Governments Discover Competition is Key to Reducing Costs*, USA Today, June 22, 1995 ..... 19n

Treatises

Robert D. Sack & Sandra S. Baron, *Libel, Slander, and Related Problems* (2d ed. 1994) 17n

Rodney A. Smolla, *Law of Defamation* (1996) 13n, 20n

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Broadcasting Companies, Inc. ("ABC") respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case, entered on October 15, 1996.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, review of which is sought here, is reported at 98 F.3d 351 and is reprinted in the Appendix to this Petition beginning at 1a. (The decision was filed October 15, 1996.) The denial of rehearing and suggestion for rehearing *en banc*

by the United States Court of Appeals for the Eighth Circuit on November 26, 1996 is unreported and is reprinted in the Appendix hereto at 63a.

The district court order granting judgment as a matter of law in favor of ABC, the district court ruling directing a verdict for ABC on actual malice, and the district court opinion denying summary judgment to ABC are all unreported and are reprinted in the Appendix hereto at 27a-37a, 38a-41a and 42a-62a, respectively.

JURISDICTION

The judgment of the court of appeals from which ABC seeks review was entered on October 15, 1996. A timely petition for rehearing with suggestion for a rehearing *en banc* was denied by the court of appeals on November 26, 1996. (Three judges would have granted the *en banc* rehearing.) This Petition is being timely filed within 90 days of the date of the denial by the court of appeals of the petition for rehearing.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1332 (1994). The court of appeals had jurisdiction to hear the ensuing appeal pursuant to 28 U.S.C. § 1291 (1994). The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

STATEMENT OF THE CASE

This Petition arises from the determination of the United States Court of Appeals for the Eighth Circuit that respondent

Lundell Manufacturing Company, Inc. ("Lundell") is not a public figure. As a result, despite Lundell's acknowledged failure to establish actual malice, Lundell was awarded more than $1 million in a libel suit about a matter of admitted public controversy.

The court of appeals reached its determination despite uncontroverted record evidence that Lundell touted its garbage recycling machine to a county government as the "solution" to the county's well-publicized and highly controversial garbage disposal problems and then voluntarily entered into a public contract with the county to provide the machine. The court essentially concluded that despite this highly public role on a topic of enormous public interest, because Lundell did not itself literally *speak* about the controversy, it could thus escape being characterized as a public figure.

The litigation arose from a July 2, 1992 broadcast on the ABC television network of "World News Tonight with Peter Jennings." The broadcast included one of a series of reports on "Anger in America," designed to explore " 'why people are frustrated or angered by government.' " (98 F.3d at 354; App. 2a) The report dealt with the reaction of citizens in rural Berrien County, Georgia (the "County") to the controversial issuance of millions of dollars in revenue bonds, without voter approval, to purchase a garbage recycling machine. The machine was designed to substitute for a rapidly filling public landfill site as a means of garbage disposal and was to pay for itself (and turn a profit for the public) from the collection of user fees and the sale of the recycled products it produced. Lundell manufactured the machine.

The record below established without dispute that, well before the ABC broadcast, there had been what the Berrien County Commission Chairman characterized as "a lot of publicity given to the [Berrien County] garbage problem." (R. 404) The County "made the papers more on garbage than the local murder trials," the Chairman testified, and "it was well

known throughout south Georgia that Berrien County was looking for somebody with a solution to the garbage problem." (*Id.*)

Lundell presented its machine, in its own words, as that "solution" and contracted to provide its product to the County in the midst of the already heated controversy as to disposal issues. (R. 288-89) Several dozen articles dealing with Berrien County's garbage problems—all drawn from Lundell's own contemporaneous news clippings file (R. 289-91)—are in the record (R. 1079-81, 1083-89, 1094-1104, 1106-1146); about half of these deal with the controversy which existed before Lundell chose to sell its garbage recycling machine to the County (R. 1109-1123, 1132-46).

Among the issues publicly debated prior to the ABC broadcast were (1) whether the Berrien County Commission Chairman who arranged for the County's purchase of the Lundell garbage recyling machine had received a commission from Lundell for the County's purchase and (2) the County Chairman's subsequent employment as a sales representative for Lundell (R. 944, 952) (the County Chairman denied the first allegation (R. 372-73, 376-77) and admitted the second (R. 376-77, 437)).

By the time ABC broadcast the report on the Berrien County garbage controversy, the purchase and use of the Lundell machine already had generated a taxpayers' lawsuit (App. 43a; R. 32-33), action by the State government to revoke the Berrien County recycling operation's permit (R. 957-58), and extensive state and local media coverage, much of which referred to Lundell and its machinery by name or description (R. 949-55, 1080-81, 1083-89, 1094-1104, 1106-07, 1109-23, 1125-46).

The ABC broadcast reported the fact that although "the machine turned the garbage into fuel pellets and compost" the plant proved to be far more expensive to operate than the County Commission predicted and was eventually shut down,

with citizens now paying both to retire the bonds for the Lundell machine and to haul their garbage to a landfill site in another county. (98 F.3d at 354-55; App. 3a-4a) The broadcast quoted the County Chairman who arranged the bond issue as stating that, " 'There's nothing physically wrong with the machine. It's the people,' " and that the machine was supposed to work like another Lundell machine in Tennessee by " 'paying for itself by selling the recycled garbage and charging user fees.' " (98 F.3d at 354; App. 3a) Notwithstanding these statements, Lundell's claim, as it reached the Eighth Circuit Court of Appeals, was that it was defamed by a single sentence in the overall report which stated: " 'In this south Georgia county of tobacco farms and pecan groves, taxpayers are angry that they are stuck with a three million dollar debt for this garbage recycling machine that they never approved and *does not work*.' " (98 F.3d at 354; App. 3a) Lundell contended that this sentence would be understood to mean the machine was not, as the other statements suggest, a financial failure, but rather mechanically inoperable.

A. The Opinions of the District Court

Lundell commenced this libel action in the United States District Court for the Northern District of Iowa on August 10, 1992. Jurisdiction was premised on diversity of citizenship. *See* 28 U.S.C. § 1332. By order filed April 13, 1994 (reprinted in the Appendix hereto at 42a-62a), the district court denied ABC's summary judgment motion and permitted the case to go to trial before a jury. At the close of plaintiff's evidence, the court held, as a matter of law, that ABC had not acted with actual malice in connection with the July 2, 1992 broadcast. (The transcript of the district court ruling granting a directed verdict to ABC on plaintiff's inability to prove actual malice, rendered on May 13, 1994, is reprinted in the Appendix hereto at 38a-41a.) The district court concluded that the record evidence established "that there could not have been a high degree of awareness of the probable falsity of statements published concerning whether the [Lundell]

machine worked." (App. 40a-41a) Notwithstanding the absence of actual malice, the court allowed the case against ABC to proceed because the court concluded that "Lundell is a private-figure plaintiff." (App. 41a) The jury thereafter returned a verdict of $1,058,000 against ABC.

By order filed September 28, 1995 (reprinted in the Appendix hereto at 27a-37a), the district court granted ABC's motion for judgment as a matter of law. The court concluded that the ABC broadcast was "substantially true" because "[i]n context, the ABC story stated that Lundell's machine in Berrien County, Georgia was supposed to work like the Lundell machine in Tennessee which paid for itself by selling recycled fuel pellets and charging user fees" and that this had not occurred. (App. 34a) The court also again concluded that Lundell "is a private-figure plaintiff as it has never thrust itself into public controversy," and "never attempted to influence the outcome of the public controversy in Berrien County, Georgia." (App. 30a)

B. The Court of Appeals Decision

In an opinion rendered on October 15, 1996 (reported at 98 F.3d 351 and reprinted in the Appendix hereto at 1a-26a), a panel of the Eighth Circuit reversed the grant of judgment as a matter of law to ABC and reinstated the million dollar judgment for Lundell. The court rejected, *inter alia*, the district court's role in determining substantial truth. (98 F.3d at 360-61; App. 15a-16a) The court of appeals determined that notwithstanding ABC's contention and the district court's conclusion that the broadcast was substantially true in reporting that the machine did not work as planned, *i.e.*, was not financially viable, there was "substantial evidence from which a reasonable jury could conclude that the statement was false, and . . . conclude that the sting of the story was that the Lundell machine was mechanically inoperable." (*Id.*) (The court did not question the reality that the machine did not work in the sense that it failed to achieve financial viability and had been shut down.)

Without challenging the finding of the district court that Lundell had failed to prove that ABC had broadcast its report with actual malice, the Eighth Circuit panel rejected the proposition that Lundell was a public figure. In a two-step public figure analysis, the court determined, first, that "the particular controversy giving rise to ABC's report was the garbage disposal problem in Berrien County" and acknowledged that the controversy was "clearly a public controversy involving questions of 'public concern.'" (98 F.3d at 363; App. 20a)

The court then addressed "the 'nature and extent' of Lundell's involvement" in the controversy, concluding that "[a]lthough Lundell contracted with the county for the sale of the machine" and that the sale was a subject of heated controversy, Lundell had not thereby "placed itself into the controversy to influence the issues involved." (98 F.3d at 363-64; App. 20a-22a) In so ruling, the court made no mention of Lundell's knowledge of the heated public controversy concerning garbage disposal in Berrien County at the time it sought and obtained a contract with the County to address that problem. Nor did the court refer to the numerous articles in evidence describing Lundell generally or by name included in Lundell's own extensive news clippings file on the controversy. Instead, relying on *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), the court simply concluded that "ABC cannot, by its own conduct, create its own defense by making Lundell a public figure." (98 F.3d at 364; App. 22a)[1] The court also con-

[1] Notwithstanding this statement concerning ABC's asserted effort to make Lundell a public figure by its own conduct, elsewhere in the opinion the court noted that ABC began investigating the subject only after its journalist reviewed a story in the *Atlanta Constitution* (98 F.3d at 361; App. 16a). That story specifically described the Berrien County bond scheme, the losses incurred in connection with the Lundell recycling machine and the subsequent employment of the County Commission Chairman who arranged the bond deal as a salesman for the machine's manufacturer—Lundell. In addition, of course, the record included numerous articles about Lundell and its machine which predated the ABC broadcast.

cluded that Lundell lacked access to the press, apparently on the basis of ABC's refusal to broadcast a retraction of the report at issue. (*Id.*)

By order dated November 26, 1996 (reprinted in the Appendix hereto at 63a), the court of appeals denied ABC's petition for rehearing and suggestion for rehearing *en banc* which had focused on the public figure issue, with Chief Judge Richard S. Arnold and Judges McMillian and Murphy voting to grant *en banc* review.

REASONS FOR GRANTING THE WRIT

WITHOUT THE GUIDANCE OF THIS COURT, A SPLIT AMONG THE CIRCUITS WILL CONTINUE TO PRODUCE UNPREDICTABLE RESULTS AS TO WHETHER A PARTY THAT HAS PLACED ITSELF AT THE CENTER OF AN ONGOING PUBLIC CONTROVERSY MAY AVOID PUBLIC FIGURE STATUS SIMPLY BY DECLINING TO SPEAK TO THE PRESS

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court concluded that the key to determining whether a party is a limited-purpose public figure in connection with deciding the standard of fault in a defamation action is "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. Individuals who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" are limited-purpose public figures. *Id.* at 345. This Petition asks the Court to resolve a split among the circuit courts of appeals as to whether the requisite "participation" for public figure status requires the plaintiff literally to *speak* on a pre-existing public controversy or whether it may be premised more broadly on a plaintiff's own voluntary conduct in placing itself into the center of such con-

troversy. Put another way, can a corporate plaintiff which has voluntarily entered a raging public controversy by its sales and promotional efforts directed to that controversy avoid public figure status simply by avoiding comment?

While *Gertz* itself does not explicitly answer the question, the emphasis in *Gertz* on "participation" suggests that a "no comment" or its equivalent by a figure who has voluntarily thrust itself into a public controversy should not allow a libel plaintiff to "opt out" of limited-purpose public figure status in this fashion.

The significance of this issue is magnified when the plaintiff, as here, accepted public funds to address public needs. Allowing such a plaintiff to escape the deliberately heavy burden of the actual malice standard threatens to dampen discussion of the role of some of the most significant participants in public affairs.

The differing impact of the public/private figure dichotomy is well illustrated by this very case. Were the plaintiff classified as a public figure, this case would be dismissed since it is now undisputed that ABC acted without actual malice. Because the plaintiff was deemed instead a private figure, the report was held to give rise to liability under a negligence standard in light of the Eighth Circuit's ultimate rejection of the district court's ruling that the broadcast was substantially true.

In a world in which privatization of governmental functions is becoming ever more prevalent, reporting on the participation of corporations which voluntarily thrust themselves into public controversies by seeking to replace public functions should be entitled to the "breathing space" afforded by the public figure standard. The press should not be subjected to the hair-splitting substantial truth analysis sanctioned by the court of appeals as a result of its adoption of a private figure standard here.[2]

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[2] Issues as to substantial truth and independent review were raised below along with the public figure issues. Because of the fact-bound

More than two decades after *Gertz*, the courts of appeals remain divided on the public figure question described above, as well as broader public figure issues. That this Court still "has not definitively picked a standard for defining 'public figures,' " *Harris* v. *Quadracci*, 48 F.3d 247, 251 n.6 (7th Cir. 1995), is not in dispute. But without clearly articulated standards from this Court addressed to the discrete and fundamental issue posed by this Petition, the lower federal and state courts will continue to find the task of distinguishing between public and private figures not appreciably different from " 'trying to nail a jellyfish to the wall.' " *Snead* v. *Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994). And—as the conflicting approaches of the circuits reflected on this issue illustrate—they will continue to render inconsistent and conflicting opinions leading to the very "unpredictable results and uncertain expectations" that *Gertz* was intended to avoid. *See* 418 U.S. at 343.

A. A Split Among The Circuits Exists As To Whether The *Gertz* Requirement of "Participation" In A Controversy Requires A Potential Public Figure Itself To Speak Out On The Controversy

In its opinion below, the Eighth Circuit concluded that a plaintiff could enter what the court acknowledged to be "clearly a public controversy involving questions of 'public concern,' " while avoiding limited-purpose public figure status simply by eschewing comment on the matters at issue. (98 F.3d at 363-64; App. 20a-22a) In the view of the Eighth Circuit, neither the extent of a plaintiff's deliberate course of conduct in involving itself in a pre-existing public controversy, nor the centrality of its role in that controversy, is of moment if the plaintiff does not choose literally to debate the issues.

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character of the first two issues in this context this Petition seeks review only with respect to the case-dispositive public figure questions.

The fundamental error of that view is illustrated by the Eighth Circuit's belief that it was compelled by this Court's decision in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979). In *Hutchinson*, the Court held that the defendant could not himself turn a relatively obscure research scientist into a public figure by publicizing a mock award that ridiculed federal spending on the scientist's research. Unlike this case, in *Hutchinson* there was no pre-existing public controversy into which the plaintiff had voluntarily thrust himself; indeed, in *Hutchinson* there was no public controversy at all prior to the publicity engendered by that *defendant's* conduct. That is precisely the opposite situation from that presented here.

Under the Eighth Circuit's constricted holding, even a company that deliberately thrusts itself into a public controversy by promoting and selling its product to local government as a "solution" to the pre-existing controversy—as Lundell Manufacturing Company did—does not become a public figure for the limited purpose of public discussion about its product unless the company chooses literally to speak about the issues under debate. And this is true even if it acts—as Lundell indisputably did—with full knowledge of the controversy.

A similar rule to that adopted in this case by the Eighth Circuit has been followed by the Tenth Circuit. In *Lawrence* v. *Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981), that circuit held that a political operative who had worked in a policy-making role for Vice President Spiro Agnew, and served as a fundraiser in various campaigns, was not a public figure in connection with his consulting and fund-raising work for then Senatorial aspirant Orrin Hatch in a campaign against the incumbent. The court of appeals gave controlling weight to the fact that plaintiff Lawrence, notwithstanding the significance of his role, "made no speeches and no radio or television appearances and did not write for public consumption." *Id.* at 637.

It is plain, however, that the result reached in the present case as to limited-purpose public figure status would not have been reached in other circuits.

Both the Third and Fifth Circuits have rejected the Eighth and Tenth Circuit rule that the voluntariness of a plaintiff's participation in the particular controversy is measured only by demonstrated efforts to speak to the issues underlying the controversy. As the Third Circuit has made clear,

> "the voluntariness requirement [for limited-purpose public figure status] may be satisfied even though an individual does not intend to attract attention by his actions. When an individual undertakes a course of conduct that *invites* attention, even though such attention is neither sought nor desired, he may be deemed a public figure."

McDowell v. *Paiewonsky*, 769 F.2d 942, 950 (3d Cir. 1985) (emphasis added).

In *McDowell*, the Third Circuit rejected the very analysis adopted by the Eighth Circuit. The Third Circuit held that an architect, who had successfully bid on a public building project knowing its controversial nature, was a limited-purpose public figure as to his participation in the project and could not escape public figure status simply because he wished not to be one. *Id.* at 949-50. The architect in *McDowell* was held to be "quite different from the relatively unknown research scientist in Hutchinson" because, at the time of the challenged broadcast, the architect's work on government projects "had been the subject of considerable media attention." *Id.* at 949.

The Third Circuit's approach—unlike that of the Eighth Circuit—recognizes that if a plaintiff's voluntary actions are of sufficient centrality to a public controversy, it is of no moment that the plaintiff did not desire such public figure status. *See also Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) ("[T]he plaintiff's action may itself invite comment and attention, and even though he does not directly try

or even want to attract the public's attention, he is deemed to have assumed the risk of such attention.").

The Fifth Circuit has been equally emphatic on this point: "While an individual can achieve public-figure status by aggressively seeking public attention or by exercising his access to the media, an individual cannot erase his public-figure status by limiting public comment and maintaining a low public profile." *Trotter* v. *Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 435-36 (5th Cir. 1987). In that case, the Fifth Circuit held that Trotter, the president of a corporation embroiled in a violent labor dispute, was a public figure for the limited purpose of public discussion of the anti-union violence even though he had not actively sought out public attention and his name had not appeared frequently in the press. Although Trotter urged that he lacked access to the press (and the opinion recounts no statements made by him to the press), Trotter's "sufficient involvement" in the labor controversy was itself enough to impose public figure status on him "whatever the quantity of his public statements." 818 F.2d at 436. *See also Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, . . . that '[plaintiff] voluntarily engaged in a course that was bound to invite attention and comment.' ").[3]

The District of Columbia Circuit has adopted a formal test that would likely lead to results in accord with the approach of the Third and Fifth Circuits. In *Waldbaum* v. *Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 & n.34 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980), that circuit adopted a

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[3] *See also* Rodney A. Smolla, *Law of Defamation* § 2.13[2], at 2-40 (1996) ("But just as the media is not permitted to bootstrap itself into creating its own defense by focusing attention on the plaintiff through the very speech alleged to be defamatory, the plaintiff is not permitted to avoid the strictures of the actual malice standard by protesting 'I didn't want the attention.' ").

three-part public figure test that requires that (1) the controversy be public both in the sense that people are discussing it and that persons beyond the immediate participants are likely to feel the impact of its resolution; (2) the plaintiff have more than a trivial or tangential role in the controversy; and (3) the alleged defamation be germane to the plaintiff's participation in the controversy. *Id.* at 1296-98. Under the *Waldbaum* test, a plaintiff need only have played a "sufficiently" central role in the public controversy to be accorded public figure status for the limited purpose of discussion about that controversy. *Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990) (plaintiff held to be a public figure where he "engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy"); *see also Trotter*, 818 F.2d at 436 (where the Fifth Circuit adopted the *Waldbaum* test).[4]

The uncertainty engendered by the split among the circuits as to the public figure status of one who, while a central actor in a public controversy, declines to speak out constricts the ability of the news media to ensure fulfillment of the First Amendment imperative "that debate on public issues . . . be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). As *Gertz* recognized, it is

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[4] "[B]ecause the Supreme Court [still] has not defined the precise contours of who constitutes a 'public figure,' " *Harris*, 48 F.3d at 250 n.5, the *Waldbaum* formulation has been denominated as the "federal analysis" by some courts, *see id.* at 251, and has been been adopted by a number of state courts, *see, e.g.*, *Mount Juneau Enterprise, Inc.* v. *Juneau Empire*, 891 P.2d 829, 836 (Alaska 1995); *Copp* v. *Paxton*, 45 Cal. App. 4th 829, 845-46, 52 Cal. Rptr. 2d 831, 844 (Cal. Ct. App. 1996), *review denied* (Cal. Aug. 14, 1996); *Hunter* v. *Hartman*, 545 N.W.2d 699, 704 (Minn. Ct. App. 1996), *review denied* (Minn. June 19, 1996). *But see Clardy* v. *Cowles Publishing Co.*, 912 P.2d 1078, 1083-84 (Wash. Ct. App. 1996) (rejecting *Waldbaum* formulation). In the opinion below, the Eighth Circuit applied the *Waldbaum* formula for determining the existence of a "public controversy" (98 F.3d at 363; App. 20a), but adopted its own *ad hoc* standard for assessing Lundell's role in the controversy, *i.e.*, demonstrated effort literally to speak on the issues.

important to provide rules that can avoid "unpredictable results and uncertain expectations." 418 U.S. at 343. That can only occur when this Court resolves the conflict between the circuits presented by this Petition.

B. The Court Should Adopt A Standard That Recognizes The Public Figure Status Of Both Speakers And Other Participants In Public Controversies

Under *Gertz*, Lundell should be considered a public figure because it voluntarily and purposefully "thrust [itself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." 418 U.S. at 345. Lundell entered the long-standing and well-publicized Berrien County garbage disposal controversy after promoting and advertising its recycling machine as "the latest and best technology for handling garbage throughout the world." (R. 288) It knew that sales of the machine itself had evoked media coverage and it amassed a contemporaneous collection of news stories about Berrien County's garbage disposal problems before it chose to sell its machine to that County. (R. 288-91)

When Lundell subsequently offered and sold its product to the County government as a "solution" to the County's garbage disposal problems (R. 129, 167-68, 288), it chose a course of conduct that it had to know would invite public attention and comment. It is undisputed that, in the words of the Berrien County Commission Chairman, the County "made the papers more on garbage than the local murder trials." (R. 404) Lundell further ensured its position in the public eye by hiring as a sales representative the very Berrien County Commission Chairman who had approved the County's publicly financed purchase of the Lundell machine. (R. 376-77, 437, 944, 952) That Lundell did not choose to comment itself on the issues involved in the "garbage disposal problem in Berrien County" (98 F.3d at 363; App. 20a)—or publicly debate the County's controversial public financing of the Lun-

dell machine—does not detract from Lundell's very prominent role in this very public controversy.

The Eighth Circuit's contrary analysis leads to results that are at odds with the principles that underlie the *Gertz* recognition that participants in public controversies are to be treated differently from those who had no such role. Dow Chemical Company, for example, would have been deemed a private figure under the Eighth Circuit approach with respect to public debate about the use of napalm during the Vietnam War if Dow did not itself publicly comment about its manufacture and supply of the chemical to the U.S. Government for use during the Vietnam War. A studied "no comment" would have avoided limited-purpose public figure designation, even though "[p]erhaps more than any other word associated with the Vietnam conflict, napalm came to define the sides in a bitter national—and international—debate." Tony Perry, *Waging a Low-Key War on Napalm*, Los Angeles Times, Dec. 3, 1994, at A-1.

In the absence of a standard that recognizes the public figure status of a participant in a particular public controversy because of its voluntary conduct which places it at the heart of a pre-existing public debate, such results would be inevitable. Such results would also be facially inconsistent with the rationale of *Gertz* which recognized the press' need for "breathing space" in reporting about those who have voluntarily involved themselves in matters of public controversy.

C. It Is Particularly Important To Provide The Press With The Breathing Space Provided By The Public Figure Standard When, As Here, A Plaintiff By Its Conduct Has Invited Public Attention And Assumed The Risk Of Media Scrutiny

In *Gertz*, this Court stressed that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood con-

cerning them." 418 U.S. at 345. That assumption is justified because public figures like public officials have assumed the risk of such media exposure by themselves "invit[ing] attention and comment." *Id.* The Eighth Circuit disregarded this important normative consideration in concluding that Lundell was not a public figure for the limited purpose of public discussion about the garbage recycling machine it promoted and sold to Berrien County as a solution to the County's ongoing garbage problems.[5]

The notion that businesses and consultants that market and sell their products and services assume the risk of public scrutiny and media exposure has particular force when those

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[5] The assumption of the risk rationale underlying *Gertz* and its progeny has been applied by many other courts which—unlike the Eighth Circuit—accord public figure status to businesses that advertise and market their products and services. *See, e.g., Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980) (by advertising its products, corporation invites public attention, comment and criticism and thereby acquires limited-purpose public figure status); *National Foundation for Cancer Research, Inc.* v. *Council of Better Business Bureaus, Inc.*, 705 F.2d 98, 101-02 (4th Cir.) (charity deemed public figure because it "thrust itself into the public eye" through advertising and solicitation campaign), *cert. denied*, 464 U.S. 830 (1983). Even under the rationale of some courts that have refused to base public figure status on a business plaintiff's advertising efforts alone, Lundell would qualify as a public figure. *See, e.g., Golden Bear Distributing Systems of Texas, Inc.* v. *Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir. 1983) (business plaintiff not public figure merely by advertising its services; there must be "pre-existing public controversy"). At least one court applies an actual malice standard when a company's products and services intrinsically implicate important public issues, such as public health. *Dairy Stores, Inc.* v. *Sentinel Publishing Co.*, 516 A.2d 220, 229-30 (N.J. 1986) (applying New Jersey law). As one commentator has observed: "Although it is not entirely clear where the weight of authority lies, someone doing business in the public marketplace should be considered 'public' to the extent for purposes of comment about that activity. A public business does, indeed, volunteer goods or services for public evaluation and criticism, which comports with the common-law concept of public figure for purposes of applying the 'fair comment' privilege." Robert D. Sack & Sandra S. Baron, *Libel, Slander, and Related Problems* 268-69 (2d ed. 1994).

products and services are marketed and sold to the government itself, for purchase with public funds, as a solution to a pre-existing public controversy. In *McDowell*, for example, the Third Circuit held that the plaintiff's decision to accept a controversial public assignment "almost inevitably put him into the vortex of a public controversy. Just as a professional athlete or coach must accept the attendant publicity surrounding his decision to assume his position, so must plaintiff accept the consequences of his decision." 769 F.2d at 950 (footnote omitted).[6]

As the Third Circuit approach correctly recognizes: " 'The purpose of the First Amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge.' " *Id.* (*quoting Marcone*, 754 F.2d at 1086).

The need for "breathing space" for a vigorous press, rooted in constitutional concerns, is especially crucial today in light of the accelerating trend toward privatization of federal, state and local government services.[7] Government functions are

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[6] Other courts also have held that private businesses and consultants who accept public work are limited-purpose public figures. *E.g.*, *Reuber* v. *Food Chemical News, Inc.*, 925 F.2d 703, 708-09 (4th Cir. 1991) (*en banc*) (scientist employed by private firm under public contract with National Cancer Institute was limited-purpose public figure), *cert. denied*, 501 U.S. 1212 (1991); *Clyburn*, 903 F.2d at 31 (owner of consultant firm which frequently contracted with D.C. government was limited-purpose public figure); *Nicholson* v. *Promotors on Listings*, 159 F.R.D. 343, 349 (D. Mass. 1994) (independent consultant hired by city government). Indeed, the Fourth Circuit has suggested that "[t]here well may be circumstances in which a consultant employed by a government entity could be classified as a public official." *Arctic Co.* v. *Loudoun Times Mirror*, 624 F.2d 518, 522 (4th Cir. 1980) (dicta), *cert. denied*, 449 U.S. 1102 (1981).

[7] " 'The federal government, in fact, has privatized far more functions than most Americans realize,' " according to the conclusions of political scientists John J. DiIulio, Jr. and Donald F. Kettl in their 1995

increasingly performed by those who are not "public officials" and who, if they simply avoid comment, would not be public figures under the Eighth Circuit's standard, whatever their actual involvement in the framing or resolution of public controversies. This would have an extraordinarily inhibiting effect on the "robust" and "uninhibited" debate the First Amendment is intended to foster. *New York Times Co.* v. *Sullivan*, 376 U.S. at 270.

Private businesses, of course, are not directly accountable to the public. This lack of public accountability—on the part of entities increasingly granted authority to "solve" social problems formerly addressed by government entities—has raised growing concern that the "watchdog role" of the press will be undermined because of its inability "to adequately monitor corporate managers of the public weal." Bill Kovach, *When Public Business Goes Private*, The New York Times, Dec. 4, 1996, at A-29. As the facts of the present case may well demonstrate, "if not watched closely and measured carefully, privatization and outsourcing can lead to extravagant cost overruns and shoddy public services." Peter Behr, *Solving the Privatization Puzzle*, The Washington Post, Feb. 13, 1995, at F-01. Yet the Eighth Circuit decision will discourage all but the boldest members of the press from reporting freely on the entities that are playing ever more meaningful roles in public controversies.

Brookings Institution report. David Wessel, *The American Way? In the U.S., Ideology and Budget Concerns are Feeding the Privatization Fever. But Are We Going Too Far?*, The Wall Street Journal, Oct. 2, 1995. For example, the Department of Energy contracts out nearly its entire nuclear-bomb-manufacturing operations, from design through production and cleanup. *Id.* On the local level, " '[t]here's not a single type of service that a local government is providing that isn't privatized somewhere,' " from garbage collection and garbage recycling to hospitals and highways to schools and skating rinks. Richard Wolf, *Local Governments Discover Competition is Key to Reducing Costs*, USA Today, June 22, 1995.

Treating a company such as Lundell as a public figure is particularly fair and just when it seeks to profit from its dealings with government. Private contractors know that certain burdens are a concomitant of public work. When they contract with the federal government they know, for example, they must make available "upon request" information pertaining to compliance with affirmative action requirements. 41 C.F.R. § 60-1.40(c) (1996). When they enter into defense contracts, they know they must open their "books, documents, papers, and records" to government auditors. 22 U.S.C. § 2586 (1994).

Similarly, when a company such as Lundell advertises and sells its product to government as the "solution" to a raging public controversy, and that product is paid for with public monies, the company must accept "certain necessary consequences of that involvement in public affairs." *See Gertz*, 418 U.S. at 344.

By voluntarily engaging in a course of conduct that inevitably places them in the public eye—and which *should* lead to greater public scrutiny—such businesses invite public attention and comment and thereby "voluntarily expose[ ] themselves to increased risk of injury from defamatory falsehood concerning them" (*Gertz*, 418 U.S. at 345). Corporations which undertake to replace services traditionally supplied by the government and in doing so thrust themselves into a preexisting controversy should not be immune from the searching scrutiny the public figure standard is designed to foster.[8]

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[8] Some courts have concluded that since the "reputational interests of . . . corporations is *de minimis* compared to the reputational interests of [an individual]," a corporation, by definition, is a public figure. *Jadwin* v. *Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 487-88 (Minn. 1985); *Martin Marietta Corp.* v. *Evening Star Newspaper Co.*, 417 F. Supp. 947, 955-56 (D.D.C. 1976). *See also* Rodney A. Smolla, *Law of Defamation* § 2.24[2], at 2-82 & n. 495 (1996) ("The impersonal nature of a corporation is thus a factor militating in favor of treating corporations as public figures, since corporate reputation is arguably of less significant social importance than the interests in human dignity protected by defamation rules for natural individuals.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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